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Supreme Court of the United States

October Term, 1971

71-986

NO._____

ROBERT BRYAN CRESTFIELD, *Petitioner*

v.

TEXAS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Robert Bryan Crestfield, Petitioner, prays that a Writ of Certiorari issue to review the judgment of the Court of Criminal Appeals of Texas entered in the above entitled case on July 28, 1971.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Criminal Appeals is printed in Appendix A hereto, *infra*, p. 11, and is reported in 471 S.W.2d 50.

JURISDICTION

The judgment of the Court of Criminal Appeals was entered on Juy 28, 1971. Petitioner's Motion for Rehearing was denied by said Court without opinion on

October 20, 1971. Upon application duly filed therefor, Mr. Justice Powell ordered on January 21, 1972, that the time for filing this petition for a writ of certiorari be extended to and including February 1, 1972. Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

(1) Where a state court rules over objection that testimony from the arresting officer is admissible on rebuttal that an unidentified third party informed the officer in Petitioner's presence and while Petitioner was under arrest that Petitioner had been trying to sell LSD pills earlier in the day, is such evidence so prejudicial as to deprive Petitioner of a fair trial by an impartial jury in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

(2) Did the arresting officer's contradictory testimony as to the reason for arresting Petitioner evince merely a pretext for searching his person, in violation of the Fourth Amendment's prohibition against unreasonable searches?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

The Fourth Amendment to the United States Constitution provides in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

Section 28-2 of the City Ordinances of the City of Houston provides in pertinent part:

> "It shall be unlawful for any person to sleep in or about any . . . restaurant . . . without the consent or permission of the owner, tenant, manager, or custodian of such place or premises, within the corporate limits of the City . . ."

STATEMENT OF THE CASE

Petitioner was a nineteen-year-old resident of California, enrolled in an extension class at the University of Southern California, when, on a Monday morning in September, 1969, he started hitch-hiking his way from Goleta, California, to Houston, Texas, to attend the "Invitational Nine Ball Tournament" — a pool tournament involving some nationally famous pool players in a championship match — which was to occur at the "Le Cue Pool Hall" in Houston. Arriving in Houston on a Thursday night at 7:00 o'clock p.m., with only a few 15 minute cat-naps while on the road, Petitioner went directly to the pool hall, although "extremely tired and dirty" (S.F. p. 92). After paying his entrance fee, he went to the pool room and watched various people playing pool. He did not sleep that night because he "was very engrossed in watching the games" (S.F. 96). At 10:00 o'clock the next morning, he went with a friend to a neighborhood hotel where he borrowed some fresh clothing and returned immediately to the games in the pool hall. Petitioner remained there all day until that evening, when the arresting officer claimed that Petitioner was sleeping in a chair

outside the area adjoining the grills (S.F. 17). Although the arresting officer's testimony is contradictory as to *why* he arrested the Petitioner. (S.F. 10 — "Because he was sleeping in a public place and I had a complainant") as compared with S.F. 11 — "I didn't go over there with the intention of making an arrest because the man was asleep in a public place, no" as compared with S.F. 10 — "The incoherency of his talk and his actions and mannerisms and the dilation of the pupils",* the fact remains that Petitioner was then arrested and searched. During the testimony adduced on the Motion to Suppress immediately before the trial, the officer said that (S.F. 9) Petitioner was arrested NOT when he woke him up, but only when he had accompanied the Petitioner downstairs, but in the trial on the merits, he stated (S.F. 40), "He was under arrest as soon as he stood up and I got my hands ahold of his arm to escort him out." Pills were found in Petitioner's clothing during the search of his person, which the Houston Police Department chemist testified were analyzed and found to contain LSD. Petitioner took the stand to deny that he knew the pills consisted of the prohibited drug, and that the clothing he was wearing at the time of the search was his. He was followed by his father, Arthur Mead Crestfield, an Associate Professor of Chemistry at the University of California at Santa Barbara, who testified that the analysis conducted by the Houston Police Department was significantly defective and, accordingly, unreliable (S.F. 119-130). After the Petitioner rested, the State recalled the arresting Officer, R. L. Mayberry, who then testified that after he had awakened the Petitioner, "someone" not further identified approached him in the Petitioner's pres-

* To ascertain this while Petitioner was sleeping requires perception amounting to clairvoyance.

ence and said that the Petitioner had been trying to sell the pills earlier that afternoon. The Court overruled Petitioner's motion for a mistrial and both sides closed.

The jury found Petitioner guilty and sentenced him to six months in the County Jail and a fine of three thousand dollars. Appeal was duly taken to the Texas Court of Criminal Appeals which, on July 28, 1971, affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT

1. The facts of this case present a particularly vivid illustration of how a prosecutor can introduce testimony from an invisible and unknowable witness that can literally devastate a defendant.

Statement

Immediately before trial, Petitioner filed a motion in limine (R. 8), requesting the Court to instruct the State's attorney "not to assert or suggest, directly or indirectly, that Defendant has committed other offenses — particularly, that he has sold, or attempted or offered to sell, either LSD or any other prohibited drug — to the jury during any phase of the trial of this case, or to introduce, or offer to introduce, any evidence thereof, during said trial." The trial court sustained Petitioner's motion "unless such assertions become admissible." Directly contrary to the meaning and intent of this sustained motion, however, the prosecutor, after the Petitioner rested, recalled the arresting officer (S.F. 143) *solely* to testify that a mysterious witness—wholly unidentified and not subject to cross-examination — allegedly had approached him after he had awakened Petitioner and, in Petitioner's presence, stated that the Petitioner had been

trying to sell the LSD pills that afternoon. Petitioner immediately moved for a mistrial because of the irremediable effect upon the jury (S.F. 144), but the court overruled same.

The exquisite timing of such officer's testimony evinces a clear purpose on the part of the prosecutor to highly inflame the jury just before it retired to consider its verdict. What makes this tactic of the prosecutor particularly unsavory is that the mysterious witness was and is forever unavailable for cross-examination, since his identity—even his name—is completely unknown.

It thus appears to be a well-calculated and flagrant breach of the Sixth Amendment's guarantee that "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

A prosecutor's attempt to introduce evidence showing that the accused has committed other criminal acts is highly improper and objectionable. One may not be convicted of one crime on proof that he committed another crime.

Watson v. State, 175 S.W.2d 423;
Drew v. U. S., 331 F.2d 85.

Such evidence introduces an extraneous issue, confuses the defense, and diverts the attention of the jury from the considerations of the accused's guilt or innocence for which he is on trial.

Scroggings v. State, 111 S.W.2d 273;
Young v. State, 261 S.W.2d 336;
Robbins v. State, 265 S.W.2d 108;
Coston v. State, 268 S.W.2d 180.

In *People v. Gregory*, 177 N.E.2d 120, the accused was tried on a charge of murder. The prosecutor read the accused's confession to the jury without deleting references of "prior jobs" and "other jobs" he had "pulled" with his co-defendant. Although the defendant asked for a mistrial, the trial court merely instructed the jury not to consider the "other jobs." In reversing the conviction, the Supreme Court of Illinois stated:

> "Once a jury is permitted to hear evidence strongly calculated to impress the minds of the jurors and create prejudice against an accused, the damage is done. Jurors are not robots but are humans with qualities common to all persons."

In the case at bar, however, the trial court made no such effort to cure the inflammatory character of such last-minute testimony. Moreover, the prosecutor argued (S.F. 156) extensively before the jury at the punishment hearing the matter of attempted sale, over Petitioner's objection, thus resulting in an exceptionally severe punishment verdict—six months imprisonment and a $3,000.00 fine.

The Court of Criminal Appeals held that Petitioner's objection, based on the hearsay rule and his motion in limine, was not sufficient; that although the testimony was objectionable and an objection had been timely made, it was not quite in proper form. Yet the Court says that "The admission of such testimony was an infringement against the appellant's rights against self-incrimination and a violation of the confession statute." Such rights are basic, constitutional, and essential to the notion of due process. They should not be dependent upon an exquisite nicety in invoking the correct incantation. Such a holding would reduce constitutional rights to trivialities; their

protection would be contingent upon a ritualized formulation amounting to gamesmanship. Petitioner submits that constitutional rights should rest on more solid ground, and that the right to confront and cross-examine one's accuser is fundamental to a fair trial. To deny Petitioner this right is to deprive him of due process vouchsafed by the Fourteenth Amendment to the Constitution of the United States.

2. This case also presents the delicate question whether the arrest was motivated actually by the Petitioner's sleeping in the chair while the pool tournament was proceeding, rather than by the arresting officer's desire to search Petitioner for suspected drugs. Ever since *United States v. Lefkowitz*, 285 U.S. 452, it has been well settled that "an arrest may not be used as a pretext to search for evidence."

Prior to the actual trial on the merits, Petitioner filed his Motion to Suppress (R. 4), alleging that the LSD pills seized from the appellant were obtained as an incident to an unlawful arrest. After a full hearing on Petitioner's Motion to Suppress (S.F. 5-25), consisting entirely of the testimony of R. L. Mayberry, a police officer of the City of Houston, the Court overruled said Motion (S.F. 25), to which Petitioner excepted (S.F. 26), and subsequently permitted over Petitioner's objection the State to introduce said evidence during the trial on the merits (S.F. 64).

Both sides stipulated and agreed to the introduction into evidence of Section 28-2 of the City Ordinances of the City of Houston, relating to the prohibition against sleeping in public places. (S.F. 4). Said ordinance makes it unlawful for any person to sleep in eight different categories of public facilities or accommodations, the fourth

one of which is a restaurant, but none of which is a pool hall, or anything resembling same, without the consent of the owner, manager, or custodian thereof.

Officer Mayberry testified that Petitioner was sleeping in his chair (S.F. 6) while watching the pool tournament, *outside* the area adjoining the grills (S.F. 17), and he arrested him for reasons which are unclear, as explained in the Statement of the Case. There is no question that Petitioner had committed any other offense in the presence of the Officer—the only justification for the arrest was the claimed violation of the City Code, *if there were any such violation*. Merely because a pool hall contains some cooking grills does not thereby convert a pool hall into a restaurant, nor was Petitioner, though perhaps dozing in a chair, "sleeping" *in* the restaurant, if such it be. He was, according to the arresting Officer Mayberry, *outside* the serving area (S.F. 17), where patrons of the pool hall can observe the games. It follows, therefore, that the trial court erroneously overruled:

(a) Petitioner's Motion to Suppress (S.F. 25), and

(b) Petitioner's objection and exception to the introduction of evidence at the trial on the merits of the alleged LSD pills seized as a result of said illegal arrest. (S.F. 64).

Vindicated anticipation of what a search may disclose cannot authorize a search otherwise illegal.

Tarrater v. State, 267 S.W.2d 410;
Wells v. State, 210 S.W.2d 154;
Flanary v. State, 117 S.W.2d 71;
Butler v. State, 208 S.W.2d 89.

The validity of a search depends upon the validity of the initial arrest.

Byars v. U. S., 47 S.Ct. 248;
Henry v. U. S., 80 S.Ct. 168.

Its character is not changed by its results.

United States v. Di Re, 68 S.Ct. 222;
Carlo v. U. S., 286 F.2d 841.

CONCLUSION

Because the aforedescribed arrest was used as a pretext to search, and because the arresting officer's testimony as to the mysterious witness's accusation was devastating in its impact upon Petitioner, thereby depriving him of due process of law and the constitutional rights to be free of unreasonable searches and to confront one's accuser, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of _____, 1972, a copy of the foregoing Petition for the Writ of Certiorari was served upon counsel for Respondent, the Hon. Crawford C. Martin, Attorney General of Texas, by mailing a copy thereof to him at his last known address, to-wit: P.O. Box 12548, Capitol Station, Austin, Texas 78711, attention of Howard M. Fender, Assistant Attorney General, through the United States Mail, postage prepaid.

BEN G. LEVY

APPENDIX A

NO. 43,852

ROBERT BRYAN CRESTFIELD, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal From HARRIS County

OPINION

This is an appeal from a conviction for possession of LSD; the jury assessed the punishment at six months in jail and a fine of $3,000.

Officer R. L. Mayberry of the Houston Police Department testified that late in the night of September 5, 1969, he was working an extra job at a national pool tournament being held at the Le Cue Club in Houston. Someone called his attention to the appellant, who was asleep and "sitting slouched in a chair approximately three to four feet from the booth area of the restaurant part of the club." He tried to wake the appellant and had to shake him several times in order to do so. The appellant's eyes were dilated and he did not seem to understand what the officer was saying. This occurred in the upstairs portion of the club and he escorted the appellant downstairs. The appellant had difficulty in walking and appeared to be under the influence of some type of narcotic or drug. Upon searching the appellant, he found a cigarette package with a plastic bag containing about 100 pills.

Other officers corroborated Officer Mayberry's testimony, and the pills were shown to be LSD.

The appellant testified he was 19 years old, a student in college in California, and that he had hitch-hiked to Houston to watch the pool tournament. He further testified he watched several games of pool, that he had borrowed the clothes he was wearing from a friend in Houston, that he was tired and sleepy and would close his eyes from time to time while watching the pool games. Further, that the officers shook him, escorted him downstairs and searched him. He testified that he did not know there were LSD pills in the clothes, that he had never used LSD, and that he had never been in trouble with the law.

The sufficiency of the evidence is not challenged.

The appellant's first ground of error complains because the court overruled his motion to suppress evidence based on a contention that the LSD pills were obtained as an incident to an unlawful arrest. The motion to suppress was filed on the date of the trial, November 5, 1969.

At the hearing on the motion to suppress, it was established that Officer Mayberry first approached the appellant because a waiter complained that the appellant was asleep and in the way of the pool players. The appellant appeared not to understand what the officer was saying, and his speech and actions were incoherent. Although Mayberry did not originally plan to arrest the appellant, because of the difficulty in handling him and his suspicion that the appellant was under the influence of drugs, he decided to arrest him for being asleep in a public place. A Houston city ordinance defining that offense was introduced into evidence. Among the places where sleeping was prohibited by the ordinance were

restaurants, and the appellant was asleep in the restaurant portion of the pool hall. The search was conducted after the officer had aided the appellant in walking downstairs. The cigarette package with the bag containing LSD pills was found in the left breast pocket of the outer shirt.

Since the arrest was lawful, the search incident thereto was lawful. Slaughter v. State, 439 S.W.2d 836; Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685.

Under Art. 28.01 V.A.C.C.P., the court did not abuse its discretion in overruling the motion. See: Bosley v. State, 414 S.W.2d 468; Swanson v. State, 447 S.W.2d 942.

Further, the appellant himself testified that the LSD tablets were in his clothes, and he cannot complain that they were in evidence. Parker v. State, 384 S.W.2d 712; McCain v. State, 363 S.W.2d 257; 5 Tex. Jur. 2d 708, Sec. 46.

The appellant's first ground of error is overruled.

The appellant's second ground of error complains of the admission into evidence of certain testimony by Mayberry to the effect that someone had told Mayberry that the appellant had been trying to sell the pills. After appellant had testified that he did not know the pills were in the clothing, Mayberry testified on rebuttal. The testimony was as follows:

"Q. Officer Mayberry, after you woke the defendant up and before he left in the custody of Officer Turner, did anyone approach you in the defendant's presence and say anything concerning anything about any pills?
"A. Yes, sir, they did.
"Q. What did they say?

"A. Stated that this subject had been trying to sell those pills early in the afternoon.

"MR. LEVY: Objection, Your Honor. We would ask for mistrial. This has absolutely nothing to do with this case. This is purely hearsay and has nothing to do with the facts in this case and it's designed only to prejudice the jury. We ask for a mistrial.

"THE COURT: Motion for mistrial is overruled. Counsel for the State may go into whether or not it was within the hearing distance of the defendant."

On cross-examination, Mayberry testified as follows:

"Q. You did not see any sale in your presence, did you?

"A. No, sir. I have stated that."

On November 6, 1969, the court granted the appellant's motion in limine to instruct the prosecution not to assert or suggest that the appellant committed other offenses, particularly sale of LSD. The court, however, sustained the motion "unless such assertions become admissible."

The appellant relies on the general rule that evidence of extraneous offenses is inadmissible, and to some extent, on the hearsay rule. The State relies on the rule that evidence of the commission of other crimes by the accused may be used to show identity of person, intent, motive, scienter, system, and malice. Wagner v. State, 463 S.W. 2d 432; Williams v. State, 441 S.W.2d 853.

Texas follows the rule allowing extraneous offenses to show intent and such "evidence can be offered as direct testimony, and in a case of circumstantial evidence where intent is an issue, *but it more often is permitted to come in the form of rebuttal evidence after the appellant has testified or offered a defense wherein he has stated that*

he did not intend to do the act." (Emphasis added). O'Brien v. State, 376 S.W.2d 833. Since the appellant denied his knowledge and intent, evidence of another offense was admissible.

The appellant also complains because the testimony was hearsay. However, an exception to the hearsay rule lies where a declaration or statement is made by a third person in the presence of the accused. 24 Tex. Jur. 2d 75, Sec. 563.

"Where a statement or remark is made in defendant's presence, which he understood and which called for a reply, his silence or acquiesance may be shown as a confession where he was not under arrest." 1 Branch's Ann. P.C. 91, Sec. 87. Thus, any objection to the testimony on the grounds that it is hearsay is invalid.

In this case, the appellant was under arrest when the statement was made. Therefore, in the face of a proper objection, the testimony should have been excluded. "Whether warned or not, the silence of a defendant while under arrest cannot be used against him as a confession of the truth of statements made in his presence by his co-defendants or anybody else." 1 Branch's Ann. P.C. 91, Sec. 87.

In De Lira v. State, 297 S.W.2d 953, the court applied this rule to a similar fact situation and reversed. In that case, however, an objection was taken to the admission of the evidence on the grounds that the appellant was under arrest at the time the statement was made. Likewise, in this case, such statement, though made in the presence of the accused, is not admissible if the proper objection is made.

The proper objection would have been that the appel-

lant was under arrest at the time. The admission of such testimony was an infringement against the appellant's rights against self-incrimination and a violation of the confession statute. Art. 38.21, Art. 38.22, V.A.C.C.P. It was not objectionable on the ground that it was hearsay. Since the proper objection was not made, any error is waived.

The appellant's second ground of error is overruled.

The appellant's third ground of error complains that the city chemist was allowed to testify, on behalf of the State, as to his opinions outside the area of his professional expertise.

The chemist testified that LSD was a hallucinogenic drug and that "under the influence of a hallucinogenic drug one hallucinates and begins to see or hear things that are not actually there and puts things out of their real perspective." The chemist had given an extensive answer to the State's question concerning the effects of LSD before any objection was made. The objection came too late to preserve error. Renfro v. State, 242 S.W.2d 772; Jenkins v. State, ____S.W.2d____ (No. 43,768).

The chemist twice testified that the effects of LSD can be long lasting. On one of those occasions, no objection was made. Therefore, no reversible error is shown. Van Bibber v. State, 371 S.W.2d 880.

The appellant's third ground of error is overruled.

There being no reversible error, the judgment is affirmed.

Roberts, Judge

(Delivered July 28, 1971)
Odom, J., not participating.

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BRIEF IN OPPOSITION TO THE GRANTING OF WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Comes now the State of Texas, Respondent, by and through its Attorney General, and files this brief opposing the granting of a Writ of Certiorari.

Respondent could quarrel with some aspects of the facts set forth in Petitioner's Statement of the Case but prefers to simply rely upon the facts set forth in the opinion of the Texas Court of Criminal Appeals (reported at 471 S.W.2d 50 and set forth *in haec verba* in the appendix to the Petition herein at p. 11).

Point 1 (Restated from Petition)

Where a state court rules over objection that testimony from the arresting officer is admissible on rebuttal that an unidentified third party informed the officer in Petitioner's presence and while Petitioner was under arrest that Petitioner had been trying to sell LSD pills earlier in the day,

is such evidence so prejudicial as to deprive Petitioner of a fair trial by an impartial jury in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

At the trial petitioner testified and raised the question of his "knowledge" that he possessed prohibited drugs. On rebuttal the State offered testimony that Petitioner offered to sell the pills in question in order to show that Petitioner *did* "know" that he had the pills in his possession. An objection was made to such testimony on two specific grounds, i.e., relevancy and hearsay.

As pointed out in the opinion of the Court of Criminal Appeals, neither of these grounds was valid. Evidence showing guilty knowledge is relevant even though it may also show or tend to show the commission of another crime. *Wagner v. State*, 463 S.W.2d 432 (Tex.Crim., 1971); *William v. State*, 441 S.W.2d 853 (Tex.Crim., 1969).

As to hearsay, statements made in the presence of an accused are admissible as an exception to the hearsay rule. An early landmark decision to this effect is *Johnson v. State*, 84 S.W. 824 (Tex.Crim., 1905), wherein the court stated:

> "While the witness Blythe was testifying in behalf of the state, he was permitted to state, 'I heard George Wilson say to defendant, after the killing that night, "Nannie, you have killed Della," and defendant turned around, and did not say anything.' The objection urged to this testimony was its incompetency. . . . But we believe this testimony was clearly admissible. It occurred but a short time after the homicide, and was a direct accusation to her, charging her with the commission of the offense. . . . "

Later that same year, in *Barton v. State*, 90 S.W. 877 (Tex.Crim., 1905), the court further stated:

> ". . . Now, if the defendant was not present, he could not be bound by any acts or declarations of third parties after the consummation of the conspiracy. However, any act or declaration of defendant, either prior or subseqquent to the consummation of the conspiracy or crime, showing guilt, *or any declaration in the presence of appellant*, either prior or subseqquent to the crime, that showed guilt, was provable. But declarations of third parties, not made in his presence, are not admissible." (Emphasis added.)

And in *Davis v. State*, 40 S.W.2d 808 (Tex.Crim., 1931), the following appears and would seem most appropriate to the instant cause:

> "We have no doubt of the admissibility of the testimony of the witness Jeffus to the effect that Hawkman said, in the presence and hearing of appellant, and at a place down in the woods on a branch where there were various wooden and iron barrels, 'We are going to make some whisky.' . . . That there were no other persons present, except appellant, Hawkman, and the witness, appears. What was said by Hawkman in the presence and hearing of appellant was sufficient to call for a denial by him, and, in the absence of a denial, might be binding upon him."

In its opinion the Court of Criminal Appeals pointed out that although some objection was made to the introduction of a statement by a third party as being hearsay, no objection was made concerning the fact that Petitioner was under arrest and that the third party statement (together with Petitioner's silence) would be barred as an improper confession. The opinion then held that the lack of such objection constituted a waiver. If a proper contemporaneous objection had

been made, the trial court could have taken the necessary steps to cure the error or declare a mistrial, whichever might have been proper. Petitioner cannot now be heard to complain. Furthermore, federal law permits the introduction of oral statements made under arrest. Since we are here concerned with the equivalent of an oral confession (an admission by silence), even though it might be properly excluded by Texas law, no federal question is presented.

Point 2 (Restated from Petition)

Did the arresting officer's contradictory testimony as to the reason for arresting Petitioner evince merely a pretext for searching his person, in violation of the Fourth Amendment's prohibition against unreasonable searches?

The Texas Court of Criminal Appeals reviewed the record and specifically held that the arrest was lawful and also the search incident thereto. In so doing the court applied the facts to Section 28-2 of the City Ordinances of the City of Houston and construed the applicability of such Ordinance. This construction is binding on Federal Courts under *Erie v. Tompkins*, 304 U.S. 64 (1938).

Respondent further asserts that Petitioner's attempt to say that Petitioner was three or four feet removed from the restaurant area and that such would render the arrest illegal not only flies into the teeth of the holding of both the trial court and the appellate court but also such contention would be at best a defense to the charge of violating the city ordinance and would not render the arrest any less on probable cause than if he had been sprawled in the center of the restaurant area. Since the record reflects that the arresting officer reasonably believed that Petitioner was vio-

lating the law in his presence the arrest was legal. Under Petitioner's theory he could just as logically say that he was not really "sleeping" but just temporarily closed his eyes and thus avoid the legality of the arrest.

As to Petitioner's contention that there was some apparent conflict in portions of Officer Mayberry's testimany, it would seem to be eminently more appropriate that such conflict (if any existed) should more properly be settled in the trial court (a fact finding forum) than in the Supreme Court of the United States.

WHEREFORE, PREMISES CONSIDERED, Respondent urges that review by Certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Howard M. Fender, Assistant Attorney General of Texas, a member of the bar of the Supreme Court of the United States, hereby certify that a copy of the Brief in Opposition to the Granting of a Writ of Certiorari to the Court of Criminal Appeals of Texas was served on the attorney for the Petitioner by depositing same in the United States Mail, postage prepaid, certified mail, on this the ____ day of April, 1972, addressed as follows: Mr. Ben G. Levy, 2244 W. Holcombe Blvd., Houston, Texas 77025.

HOWARD M. FENDER
Assistant Attorney General